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TORT AND ABSOLUTE LIABILITY — SUGGESTED CHANGES IN CLASSIFICATION

III

THE field for a doctrine depending on the extra-hazardous character of the undertaking "is narrow at the best; the line between the danger which calls for care and the 'extra' hazard is hard enough to draw." [1]

"While it is difficult to frame an affirmative definition of extra hazard, it is safe to assert (negatively) that certain circumstances do *not* constitute a test of extra hazard. The test of extra hazard is not merely that there is a possibility of serious harm resulting. That is true of all occupations. Nor merely that there is a probability of harm resulting from an occupation, unless it is conducted with reasonable care. That, again, is true of occupations in general." [2]

There are, as yet, no unanimously approved rules or criteria whereby to determine whether a particular user or act falls under this head of acting at peril. The highest English court some fifty years ago, in *Rylands* v. *Fletcher*,[3] undertook to lay down the so-called Blackburn Rule.

Before stating this rule, or considering its correctness, it should be said that, according to the weight of modern authority, it was unnecessary in that case to decide whether the defendants could

[1] Professor E. R. Thayer, 29 HARV. L. Rev. 811.

[2] 27 HARV. L. REV. 349, n. 15, giving further instances which do *not* constitute tests.

[3] L. R. 3 H. L. 330, 339–40 (1868).

be held liable irrespective of negligence. It would seem that the same result (judgment for plaintiff) could have been reached on the ground that the defendants were legally chargeable with negligence. True, the defendants personally were guiltless of negligence. But the engineer and contractors employed by them were negligent; and for the negligence of these persons the defendants were responsible. The duty resting upon the defendants in that case could not be discharged by delegating it to an independent contractor. (As to this last proposition there is some conflict, but the weight of modern authority is strongly in favor of it.) The view that *Rylands* v. *Fletcher* could have been decided on the ground of negligence is supported by Bishop, Street, Bohlen, and Pollock.[4]

In *Rylands* v. *Fletcher*, the following formula, enunciated by Blackburn, J., in the Exchequer Chamber in 1866, was approved by the House of Lords in 1868:

"We think that the true rule of law is, that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is primâ facie answerable for all the damage which is the natural consequence of its escape." [5]

Although the learned judge puts the qualification "*primâ facie*" before "answerable," yet the context, and indeed the entire opinion, shows that he did not think that the so-called *primâ facie* liability could be rebutted by proving that the defendant used all possible care. It is quite apparent that he thought of only two possible methods whereby defendants could escape liability, *viz.*, "by showing that the escape was owing to the plaintiff's default," "or perhaps that escape was the consequence of vis major or the act of God."

Nothing can be more general or sweeping than the word "anything" standing alone. Here it is qualified or limited only by the words "likely to do mischief if it escapes." Notice what this rule does *not* contain. The application of the rule is not restricted to

[4] BISHOP, NON-CONTRACT LAW, § 839; 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 62, 63; Professor Bohlen, 59 U. PA. L. REV. 299, n. 2; Pollock's Editorial Preface to 143 REVISED REPORTS v, vi. Pollock adds: "Moreover the case was of the class where '*res ipsa loquitur*.'"

[5] Blackburn, J., L. R. 1 Exch. 265, 279 (1866), approved in L. R. 3 H. L. 330, 339–40 (1868).

anything "likely to escape," or to anything "having a tendency to escape of itself," or to "a substance likely to escape despite the utmost care to confine it." Nor is absolute liability limited to "unusual and extraordinary uses which are fraught with exceptional peril to others." It is not required that the thing brought upon the land should be some article which owners are not accustomed to bring on their land. The rule makes no exception as to things reasonably necessary to the ordinary beneficial use and enjoyment of the land.[6]

It should, perhaps, be mentioned here that Lord Cairns, while indorsing Blackburn, gave also a test of his own, which is briefly referred to in the note below.[7]

The Blackburn Rule has not met with universal and cordial approval by English lawyers.

In the Preface to the fourth edition of Salmond on Torts (dated November, 1915), the learned author, speaking of cases of absolute liability for accidental harm, says:

". . . The scope and limits of these exceptional rules still remain covered with doubt and darkness. This is more especially so with the

[6] Some jurists, who have undertaken to state the principle upon which cases like Rylands *v.* Fletcher rest, have put the requirements much higher than in the Blackburn test. Thus, Knowlton, J., in Ainsworth *v.* Lakin, 180 Mass. 397, 399 (1902), uses the expressions "things which have a tendency to escape, and do great damage"; "unusual and extraordinary uses of property"; "unwarrantable and extremely dangerous uses of property." So Dr. Kenny, in the headnote prefixed to Rylands *v.* Fletcher, in his CASES ON TORTS, p. 600, asserts that the landowner is liable for the escape of "any *extraordinary* source of danger which he has brought upon his land."

In Rickards *v.* Lothian, [1913] A. C. 263, 280, Lord Moulton, in deciding "that the present case does not come within the principle laid down in Fletcher *v.* Rylands," says: "It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community."

[7] Rylands *v.* Fletcher, L. R. 3 H. L. 330, 339 (1868). It has sometimes been understood that the Cairns test was intended as a substitute for the Blackburn test, but Professor Bohlen thinks that Lord Cairns then intended to lay down a rule "as to how far acts, *primâ facie* actionable, may be justified because done by the defendant in the course of his use of his land for his own purpose." See 59 U. PA. L. REV. 302–04. The Cairns test is that of natural or non-natural use of his land by the defendant. Lord Cairns appears to describe a non-natural use as a use "for the purpose of introducing into the close that which in its natural condition was not in or upon it." Taking the term "non-natural user" as interpreted by Lord Cairns, the test has been subjected to very destructive criticism. The criticisms of Doe, J., in 53 N. H. 442, 448 (1873), have never been satisfactorily answered. See also SALMOND, TORTS, 4 ed., 225, 229, n. 15, and Mr. Gest, 33 AM. L. REG. (N. S.) 101–04.

rule established by the decision of the House of Lords in *Rylands* v. *Fletcher* in 1866 (1868?). No decision in the law of torts has done more to prevent the establishment of a simple and uniform system of civil responsibility, and its true meaning and limitations remain to this day the subject of dispute and uncertainty."

Sir Frederick Pollock has frankly said that he does not "like" *Rylands* v. *Fletcher*,[8] and that the rule in that case "seems needlessly harsh."[9] In his draft of an Indian Civil Wrongs Bill, section 68, he proposes a provision, that a person keeping dangerous things is bound to take all reasonably practicable care to prevent harm, and is liable as for negligence to make compensation for harm, unless he proves that all reasonable practicable care and caution were in fact used. In his work on Torts,[10] he says:

". . . one does not see why the policy of the law might not have been satisfied by requiring the defendant to insure diligence in proportion to the manifest risk, . . . and throwing the burden of proof on him in cases where the matter is peculiarly within his knowledge."

He also regrets that he cannot concur in certain views of Mr. Salmond, which would prevent the application of *Rylands* v. *Fletcher* to any case except that of actual negligence.[11]

"The extent of the exceptions made in later decisions shows" that the rule in *Rylands* v. *Fletcher* "is accepted with reluctance."[12]

In later cases "there has been a manifest inclination to discover something in the facts that took the case out of the rule."[13]

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[8] 25 L. QUART. REV. 321.

[9] POLLOCK, TORTS, 6 ed., 623, n. (*s.*).

[10] 10 ed., p. 511.

[11] See POLLOCK, TORTS, 10 ed., 511 n. (*m.*), and Editorial Preface to 143 REVISED REPORTS v, vi.

[12] POLLOCK, TORTS, 10 ed., 671, n. (*s.*). It has been decided that the rule in Rylands *v.* Fletcher does not apply to damage of which the immediate cause is the act of God (or *vis major*). Nichols *v.* Marsland, L. R. 10 Exch. 255 (1875); 2 Exch. Div. 1 (1876). It has also been held not to apply "where the immediate cause of damage is the act of a stranger." Box *v.* Jubb, 4 Exch. Div. 76 (1879).

In 8 HARV. L. REV. 389, Professor Wigmore says: "This sub-principle of 'acting at peril,' it must be added, has certain general limitations; and a special group of cases attempt to determine how far extraordinary catastrophes or the acts of third persons relieve from responsibility one who would ordinarily be 'acting at peril.'" Compare POLLOCK, TORTS, 6 ed., 475–76.

[13] See POLLOCK, TORTS, 9 ed., 661, notes, and 503, n. (*m.*); POLLOCK, LAW OF FRAUD IN BRITISH INDIA, 53–54; E. R. Thayer, 5 HARV. L. REV. 186, n. 1; Lord Moulton, in Rickards *v.* Lothian, [1913] A. C. 263, 280–81. For a similar tendency in an American

The Blackburn test is rejected by what we consider the decided weight of American authority.[14]

This doctrine imposing, in exceptional cases, absolute liability for non-culpable accident — this holding that a man, in certain cases, acts at his peril — is regarded unfavorably by some of the best modern text-writers.[15]

"Had the law been content to adopt the uniform principle that liability for accidental harm depended in all cases on the existence of negligence on the part of the defendant or his servants, most of the serious difficulties and complexities which now exist would have been eliminated. Unfortunately, however, for the simplicity and intelligibility of our legal system, it has been found necessary to recognize a number of cases of absolute liability, that is to say, liability for accidental harm independent of any negligence on the part of the defendant or his servants, and the scope and limits of these exceptional rules still remain largely covered with doubt and darkness."[16]

Some jurists would require only due care under the circumstances, a standard which would, of course, require care proportioned to the apparent risk, and thus would often, in fact, require great care. And while thus making negligence the basis of liability, they might impose upon the defendant the burden of proving care, as is done by Sir Frederick Pollock in his "Draft of a Civil Wrongs Bill Prepared for the Government of India."[17]

This doctrine that a man, in certain cases, acts at peril and is absolutely liable for non-culpable accidents is, as we have already said, a survival from the early days when *all* acts were held to be done at the peril of the doer. When the courts, in more recent times, were gradually coming to adopt the doctrine that fault is

state, where the earlier decisions were understood as having adopted the rule in Rylands *v.* Fletcher, compare City Water Power Co. *v.* City of Fergus Falls, 113 Minn. 33, 128 N. W. 817 (1910), with Cahill *v.* Eastman, 18 Minn. 324 (1872), and Wiltse *v.* City of Red Wing, 99 Minn. 255, 109 N. W. 114 (1906).

[14] For very explicit decisions, see Losee *v.* Buchanan, 51 N. Y. 476 (1873); Brown *v.* Collins, 53 N. H. 442 (1873); Marshall *v.* Wellwood, 38 N. J. L. 339 (1876). See also BURDICK, TORTS, 2 ed., 447; Professor E. R. Thayer, 29 HARV. L. REV. 814. Williams, J., in Gulf, Colorado & Sante Fe Ry. Co. *v.* Oakes, 94 Tex. 155, 158, 159, 58 S. W. 999 (1900).

[15] See POLLOCK, TORTS, 10 ed., 505, 511, 671, n. (*s.*); 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 84, 85. Compare BISHOP, NON-CONTRACT LAW, §§ 1225, 1230; and 2 COOLEY, TORTS, 3 ed., 696–97, 706–08.

[16] SALMOND, TORTS, 4 ed., Preface, v.

[17] Article 68 (*s.*). See POLLOCK, TORTS, 10 ed., 477–78.

generally a requisite element of liability in tort, the law on the subject of liability for negligence was not so fully developed as it is now. If the wide scope and far-reaching effect of the law of negligence had then been fully appreciated, it is quite probable that the courts would not have thought it necessary to retain any part of the old law of absolute liability for application in certain exceptional instances.

There was "a time when the common law had no doctrine of negligence." It has been said that, in the earlier stages of the law, "there is no conception of negligence as a ground of legal liability."

In Holdsworth's "History of English Law"[18] the author speaks of "the manner in which the modern doctrines of negligence have been imposed upon a set of primitive conceptions which did not know such doctrines." Mr. Street says that the law of negligence "is mainly of very modern growth." "No such title is found in the year books, nor in any of the digests prior to Comyns (1762–67)."[19] Sir Frederick Pollock says: "The law of negligence, with the refined discussion of the test and measure of liability which it has introduced, is wholly modern; . . ."[20] Professor E. R. Thayer says "that law" (the law of negligence) "is very modern — so modern that even the great judges who sat in *Rylands* v. *Fletcher* can have had but an imperfect sense of its reach and power."[21] ". . . the law of negligence in its present development is a very modern affair, rendering obsolete much that went before it."[22]

At the present time it is generally unnecessary, in order to do justice to a plaintiff, to adopt the doctrine of acting at peril.[23]

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[18] Vol. 3, p. 306.

[19] 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 182.

[20] 27 ENCYCL. BRIT., 11 ed., 66.

[21] 29 HARV. L. REV. 805.

[22] *Ibid.*, 814. The development of the law of negligence was retarded by a tendency to hold a defendant liable on the ground of wrong intent, where the real fault was negligence. In such cases the intent was "presumed" by fiction of law. See 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 75, 78.

[23] In some American cases the courts, while deciding in favor of the plaintiff, have cited and seemingly approved the Blackburn Rule in Rylands *v.* Fletcher. But in the great majority of these cases the facts did not call for an application of that rule, the defendant being liable on other grounds, frequently on the ground of his negligence. See Professor Bohlen, 59 U. PA. L. REV. 433–37.

We have already seen that by the weight of modern authority the decision for plaintiff in the case of Rylands *v.* Fletcher itself might have been based on negligence.

Professor E. R. Thayer says:

". . . the law has at its hand in the modern law of negligence the means of satisfying in the vast majority of cases the very needs which more eccentric doctrines are invoked to meet." [24]

If the case is a meritorious one and proper emphasis is laid on the test of

"due care *according to the circumstances*," then "the theory of negligence" will generally be "sufficient to carry the case to the jury." "How powerful a weapon the modern law of negligence places in the hands of the injured person, and how little its full scope has been realized until recently, is well shown by the law of carrier and passenger. . . ." [25]
". . . one does not see why the policy of the law might not have been satisfied by requiring the defendant to insure diligence in proportion to the manifest risk (not merely the diligence of himself and his servants, but the actual use of due care in the matter, whether by servants, contractors, or others), and throwing the burden of proof on him in cases where the matter is peculiarly within his knowledge." [26]

One argument for imposing absolute liability on the defendant is the supposed difficulty which the plaintiff lies under if he is obliged to prove defendant's negligence. Professor E. R. Thayer[27] replies:

"The difficulty is met by the doctrine of *res ipsa loquitur*. It is, indeed, the very situation for which that doctrine exists." [28]

If the two rules of law — namely, (1) the doctrine of *Rylands* v. *Fletcher* as qualified by *Nichols* v. *Marsland* and *Box* v. *Jubb*, and (2) the rule prevailing where the *Rylands* test is rejected and the defendant's liability depends on negligence —

"be compared in their practical result, the difference between the two in the actual protection given by the law to the injured person is not very great." [29] "Such an intermediate ground no doubt exists; but it is a little space. How narrow it is can hardly be realized until the full scope of the modern law of negligence is recognized." [30]

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[24] 29 HARV. L. REV. 815.
[25] *Ibid.*, 805.
[26] POLLOCK, TORTS, 10 ed., 511.
[27] 29 HARV. L. REV. 806–07.
[28] See his explanation of "the principles to which the phrase points," p. 807.
[29] Professor E. R. Thayer, 29 HARV. L. REV. 808.
[30] *Ibid.*, 804–05.

Professor Salmond, indeed, goes further and practically denies the existence of *any* "intermediate ground." He maintains[31] that, under the limitation upon *Rylands* v. *Fletcher*, which is established by *Nichols* v. *Marsland*, a landowner is exempted from responsibility "when there is no negligence at all upon the part of any one."[32]

What is the present scope, or application, of the common law doctrine imposing absolute liability in exceptional cases of non-culpable accident? What is the tendency of the courts — to extend or to restrict its application?

At the present time, in all countries where the common law prevails, we think it will be found that there are some instances of non-culpable accident where absolute liability will be imposed; some acts or uses which the courts will hold to be extra-hazardous and hence done at the peril of the doer. In many jurisdictions the test of liability will not be so broad as the Blackburn Rule. The line will be drawn in different places, varying with the particular country and with the particular date. Some cases will, at the same time, be held extra-hazardous in one country but not in another country. Thus the keeper of an elephant in England acts at peril; but not so in Burma.[33] And some cases will be held extra-hazardous in a country at an earlier date, but not so held in the same country at a later date.[34]

As to the present tendency of the courts:

On the one hand, there is now a judicial tendency to extend (to recognize more fully) the obligation of using care; to call some conduct negligent which would not have been held so a century ago.

On the other hand, there is a tendency to restrict or deny liability

[31] TORTS, 4 ed., 233.

[32] "Mr. Salmond . . . argues that Rylands *v.* Fletcher does not apply where there has been no negligence on the part of any one. I should be glad to think so if I could." SIR FREDERICK POLLOCK, TORTS, 10 ed., 511, n. (*m.*).

In the Preface to 143 REVISED REPORTS, Sir Frederick Pollock, after stating the objections to Mr. Salmond's "ingenious thesis" relative to the application of Rylands *v.* Fletcher, says: "For my own part, as I have already said elsewhere, I should like Mr. Salmond to be found in the right. The difficulties, however, are great."

[33] Compare Filburn *v.* People's, etc. Co. Ltd., 25 Q. B. D. 258 (1890), with Maung Kyaw Dun *v.* Ma Kyin, etc., 2 Upper Burma Rulings (1897–1901), Civil 570 (1900); S. C. 2 AMES & SMITH, CASES ON TORTS, ed. 1909, 548.

[34] See 27 HARV. L. REV. 352–53, as to use of a steam boiler in New York in 1807 and 1873.

in the absence of negligence or wrongful intention. Professor Wigmore,[35] speaking of the principle enunciated by Blackburn, J., in *Rylands* v. *Fletcher*, says:

". . . the tendency may perhaps be said to be in many States to restrict to as few as possible the classes of situations to be governed by the principle. An example of the latter attitude is found in the masterly opinion of Mr. Justice Doe, in *Brown* v. *Collins*, 53 N. H. 442."

If there were no modern legislation which might indirectly influence the views of judges, we should be inclined to predict that there would be a gradual diminution in the number of cases where absolute liability is imposed on non-culpable defendants, and it would even be possible that ultimately courts might cease entirely to hold defendants liable in cases of non-culpable accident.

But there is modern legislation, enacted almost wholly within the last twenty-five years, which may indirectly operate to check any further judicial tendency to exonerate in cases of non-culpable accident, and which, conceivably, may even cause courts to reverse the modern common law doctrine — that fault is generally requisite to liability. Much of this legislation is of the class usually described as Workmen's Compensation Acts. These statutes create a duty on the part of employers to compensate workmen in many kinds of industry for accidental damage, irrespective of any fault on the part of their employers or their fellow servants. This legislation singles out workmen employed in an undertaking and constitutes them a specially protected class, while overlooking other persons damaged in the same accident whose claim stands on at least equal ground.[36] The result reached in many cases under this legislation is absolutely incongruous with the result reached under the modern common law as to various persons whose cases are not affected by these statutes. The theory underlying most of the statutes, the basic principle, is in direct conflict with the fundamental doctrine of the modern common law of torts.[37] The statutes show "a distinct revulsion from the conception that fault is essential to liability";

[35] 7 HARV. L. REV. 455, n. 3.

[36] See four examples in 27 HARV. L. REV. 237–38.

[37] See *ibid.*, 245–47. Under these statutes "there is a legal liability without fault, a liability much more extensive than that which grew out of the rule *respondeat superior*, qualified as that was by the fellow servant rule and the theory of assumption of risk." Judge Swayze, 25 YALE L. J. 5.

a distinct reversion to the earlier conception, that he who causes harm, however innocent, must make it good.[38]

Here is an incongruity between statute law and modern common law as to a matter where each applies to a large class of cases.

Will this incongruity be permitted to continue permanently?[39] What available methods are there for removing it? Is not one conceivable method this: by decisions of the courts, repudiating the modern common law of torts that fault is generally requisite to liability, and going back to the ancient common law doctrine that an innocent actor must answer for harm caused by his non-culpable conduct? What arguments can be urged to induce courts to make such a change?

These questions have been discussed by the present writer more fully than is possible here in an article on "Sequel to Workmen's Compensation Acts."[40]

What are the objects to be aimed at in arranging and classifying the law? [41]

When is it expedient to make changes in existing classifications or in legal nomenclature?

Some of the best modern writers assert that the object of classification is practical convenience, not logical or scientific order, and that changes from the existing arrangement or nomenclature should be made only for very weighty reasons. "The end sought," it is said, "is a purely practical one"; "not symmetry, *elegantia*, or logical order for its own sake." The existing classification should

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[38] The great majority of these statutes do not purport to apply only to extra-hazardous occupations. See 27 HARV. L. REV. 344–45, 348, 363.

[39] "Such inconsistencies must eventually lead to a change that will assimilate the rules of liability in the different cases." Judge Swayze, 25 YALE L. J. 6.

[40] 27 HARV. L. REV. 235, 344. Special reference may be made to pages 250, 251, 363, first sentences on page 367, and last paragraph on page 368.

[41] As to the subject of classification, it has recently been said, "As a matter of fact there is a remarkable poverty in English legal literature of works dealing with the subject at all." Mr. H. J. Randall, 28 L. QUART. REV. 304. "The legal literature of England has many merits, but it is singularly deficient in orderly statements of broad principles." 22 L. QUART REV. 100. "English law possesses no received and authentic scheme of orderly arrangement. Exponents of this system have commonly shown themselves too little careful of appropriate division and classification, and too tolerant of chaos. Yet we must guard ourselves against the opposite extreme, for theoretical jurists have sometimes fallen into the contrary error of attaching undue importance to the element of form." SALMOND, JURISPRUDENCE, 4 ed., Appendix iv, 481.

not be changed simply "to force a symmetrical grouping."[42] Mr. Salmond says:

"In the classification of legal principles the requirements of practical convenience must prevail over those of abstract theory. The claims of logic must give way in great measure to those of established nomenclature and familiar usage: and the accidents of historical development must often be suffered to withstand the rules of scientific order."[43]

Sir Frederick Pollock says:

"Practical workers want to find things grouped not only, nor chiefly, in a logical order, but more or less nearly as they occur in practice; nor will any real or supposed propriety of logical division reconcile them to being constantly sent from one book to another. Law does not consist of a number of self-contained and mutually exclusive propositions which can be arranged in a rigid framework."[44]

Closely akin to the question of changes in legal classification is the question of changes in legal nomenclature. Sir Henry Maine has said that "legal phraseology is the part of the law which is the last to alter."[45] All changes of phraseology involve temporary confusion. Hence they should not be made "for the mere sake of theoretical or philological accuracy."[46] But on the other hand, it is impossible to ignore "the enormous influence of terminology on thought." "Loose definitions encourage loose conceptions."[47] There are various subjects upon which great confusion exists and will continue to exist, unless and until more exact phrases are substituted for those in popular use. Thus Mr. Bower[48] gives a schedule of sixteen expressions in use in the law of defamation, "which are either meaningless, or incorrect, or misleading, or employed in a number of different senses."

Sometimes it is, upon the whole, expedient that new terms should be substituted for old ones. A compromise is occasionally attempted. The old term is retained, but a new meaning is

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[42] See TERRY, LEADING PRINCIPLES OF ANGLO-AMERICAN LAW, § 582; Professor Wigmore, 8 HARV. L. REV. 377.

[43] SALMOND, JURISPRUDENCE, 4 ed., 481.

[44] 1 ENCYCLOPÆDIA OF LAWS OF ENGLAND, 2 ed., Introduction, 3.

[45] MAINE, ANCIENT LAW, 1 Eng. ed., 337–38.

[46] See BOWER, CODE OF THE LAW OF ACTIONABLE DEFAMATION, 487.

[47] *Ibid.*, Preface, ix, 487.

[48] Page 489.

affixed to it. But this method is apt to result in great confusion and involves frequent and lengthy explanations.

When changes are made in legal classification or nomenclature there is almost sure to be an uncomfortable transition period. Confusion and increase in litigation are likely to temporarily result "from the dislocation of established associations" and "the introduction of new technical terms." Hence such changes ought not to be made upon slight grounds. But there are cases where there are weighty reasons for the change and where the result in the long run would be highly beneficial. Here the objection of temporary inconvenience should not be allowed decisive force.[49]

What changes from the old forms of classification and nomenclature should now be made as to the general topics we have been discussing? Should any changes at all be made at the present time?

It was said, earlier in this paper, that at the present time certain divisions should be recognized as now existing in the law as held by the courts. And an attempt has here been made, in a very general way, to mark out the boundaries of each division and to enumerate the leading subtopics or cases falling within each. But we have also recognized the possibility, not to say the probability, that the scope of one division (absolute liability) may be materially lessened, it being possible that the cases now classed under absolute liability for accident may be largely, if not wholly, transferred to the division where liability attaches only in case of fault. In such an event, the cases remaining under absolute liability for accident might constitute comparatively insignificant exceptions to the rule that fault is requisite to liability.[50]

[49] Professor Terry, who in such cases is inclined to allow "very little weight" to "objections of novelty and strangeness and temporary inconvenience," adds this limitation: "There may be errors and false classifications which have struck such deep root in our law that it would be better not to attempt to tear them up." TERRY, LEADING PRINCIPLES OF ANGLO-AMERICAN LAW, § 584, p. 613.

[50] We have here been speaking solely of absolute liability in cases of non-culpable *accident*. But this constitutes only one of the three classes of cases, heretofore usually grouped under Tort, where the law has sometimes imposed absolute liability in the absence of fault. The other two classes are: (*a*) Liability for non-culpable *mistake;* and (*b*) vicarious liability for the wrongful acts of others. (See *ante*, pp. 325, 326, 327.) Even if the courts should cease to impose absolute liability for non-culpable *accident*, there would still remain the above classes (*a*) and (*b*); and in cases of wide extent arising under these classes the courts are likely to continue to impose absolute liability.

If the law is in a transition state as to accident, why not postpone attempts to reclassify or rearrange until the law has become finally settled on a new basis? Why attempt to classify or arrange in accordance with the law as now held by the courts if the existing law is not likely to be permanently adhered to? In view of the possibility of great changes, is it worth while to take time now to consider upon what system the law, as now held by the majority of courts, should be classified?

We think that it *is* desirable; and for at least two reasons:

1. Changes in the present law may be a long time in gaining a firm footing.

2. To delay attempts to classify until the law is finally and forever settled would be to postpone eternally.[51]

Those who regard the distinctions we have attempted to make as being intrinsically correct, and also as being of sufficient importance to justify *some* change from the old forms of classification and nomenclature, may differ as to the extent of the change and as to the method of expressing it.

As to such changes in the classification of topics heretofore usually grouped under Tort, three systems (at least) can be suggested, each differing from the others as well as from the old method.

System 1. Retain Torts as a general title. Include under it all cases heretofore grouped under that general head. But divide these cases into two distinct classes, each of which is to be discussed

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Under the class of non-culpable mistake, we think that the courts will continue to impose absolute liability upon one who intermeddles with tangible objects of property under a *bonâ fide* and non-negligent mistake as to the title. Under the head of vicarious liability, we think that the courts will continue to hold a master absolutely liable for the tortious conduct of his servant while the servant is acting in the course of his employment, although the master was in no fault as to the selection of the servant or as to the orders given to him. It is true that the intrinsic correctness of both the last-mentioned doctrines has been questioned; but without taking time or space to here discuss the matter, we venture the prediction that both doctrines will be adhered to by the courts.

[51] "The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow." HOLMES, COMMON LAW, 36.

separately.[52] 1. Where liability is due to fault. 2. Where the court imposes liability notwithstanding the absence of fault.[53]

System 2. Retain Torts as one of the general titles of the law. But include under it only cases where liability is due to fault.

Use Absolute Liability as a distinct title, not as describing a mere division or class under Torts. Under Absolute Liability include (*inter alia*) cases heretofore usually classed under Torts but in which there was no fault.

System 3. Reject altogether the term Tort as a general title in the law.[54]

Substitute the term General Rights, or Actionable Violations of General Right.[55]

The phrase General Rights might be understood as including all rights which inhere in the community generally, whether such rights are available against all the world or only against certain determinate persons.[56]

Divide Actionable Violations of General Rights into two classes:

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[52] In the Introduction to HEPBURN, CASES ON TORTS, 21, 22, the learned editor divides Torts into two classes:

(1) "Torts through Acts of Absolute Liability."

(2) "Torts through Acts of Conditional Liability."

(1) includes "Trespasses and Absolute Torts other than Trespasses."

(2) includes "Torts through Negligence and Torts through Acts of Intentional Harm."

[53] Under System 1, how should we define Tort — how state the essential requisites to an action of tort?

The definition would have to be in an alternative form, substantially as follows:

There must be the infliction of damage on the plaintiff by reason of the conduct of the defendant.

Either (1) where defendant's conduct is culpable (other than a mere breach of contract),

Or (2) in exceptional cases where, although defendant's conduct is non-culpable, yet there are especial reasons of policy for imposing on defendant absolute liability for the results of his conduct.

We have previously said that, according to the common definition of tort, the "damage" must be of a kind recoverable in a court of common law jurisdiction; and that in some cases the law will allow an action for infringement of right without actual pecuniary loss.

[54] ". . . proscribe, expel, and banish the obnoxious term 'Tort,' as the title of the subject." Preface to 1 WIGMORE, SELECT CASES ON TORTS, vii.

[55] "Names enough could be found. Let us agree for the moment on 'General Rights.'" WIGMORE, *ubi supra*.

[56] See *ante*, 252.

1. Where there is fault. 2. Where the court imposes liability notwithstanding the absence of fault.

As to the comparative advantages and disadvantages of the three different systems just suggested.

As to System 1. The two distinct classes are both placed where lawyers are now likely to look for them, *viz.*, under the general head of Torts. Using System 1 does not require so radical or general a rewriting of existing textbooks as might be found desirable under System 2 or 3. It closely resembles, in substance, the classification of Mr. Salmond.[57]

Per contra: The term Torts, when used to include Class 2 (under System 1), is a misnomer, and such use requires elaborate explanation. It gives the word Torts a meaning in law different from (indeed exactly contrary to) its meaning in popular speech.

As to System 2. This system corresponds more nearly with facts: it does not use the word Torts in any extraordinary or strained meaning. But it might require a practitioner (when looking up the law of his case) to examine two treatises instead of one as heretofore; or, at least, to look into two different parts of a textbook to find what heretofore was contained in one part. It would render advisable much rewriting and rearrangement of existing textbooks, if, indeed, it did not require the preparation of two separate books where only one was used hitherto.

As to System 3. By discarding altogether the term Torts we get rid of the troublesome question whether that term, if it were retained, should be used as a general title with its former wide scope, or whether it should be used as a limited title describing only a particular class. This system substitutes for Torts the phrase General Rights, which, though not a new term in law, is comparatively new, in this connection, as a leading title. Hence many practitioners might not understand what was here covered by this term, and might not look under this title to find the law of their case. System 3 may be thought more logical and clear-cut than System 1 or 2. But a long time might be required for the profession to get accustomed to the term (as a substitute for Torts), and there might be much confusion *ad interim*.

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[57] TORTS, 1 ed., Ch. 1, §§ 2, 3.

What advantage from adopting any one of the three systems, even System 1, the least radical, of the suggested changes?

Even System 1 would

(*a*) necessitate a more thorough examination of the essence of fault (*i. e.*, in the legal sense);

and (*b*) a more thorough examination of the reasons, the expediency, of sometimes adopting (imposing in certain cases), the stringent rule of absolute liability.

Neither of these inquiries, neither *a* nor *b*, have yet been subjected to such a searching examination or analysis as their importance demands.

The probable result of close investigation would be: (1) to transfer some cases — some states of fact — from the class of absolute liability to the class of cases where liability must be founded on fault; and (2) to allow immunity in some cases, where liability has heretofore been imposed.

Systems 2 and 3 would have the additional recommendation of using legal terms more nearly in accord with the meaning affixed to those terms in ordinary speech. This is desirable wherever practicable. The old law used tort in a sense quite different from its meaning in ordinary speech on non-legal topics. System 1 still uses the word tort, as a general title, in a manner open to this objection. The subdivision of System 1 into classes removes to some extent, this objection; but that subdivision is, *semble*, inconsistent with the use of tort as a general title under which to include *both* classes.

Which of these three systems are most likely to be adopted by legal writers, who agree that it is desirable to make *some* change from the old classification?

The answer may depend upon the point of view of the individual writer, upon the immediate object which he is attempting to accomplish. The maker of an index-digest or the author of a textbook for handy use by practitioners may be more likely to adopt System 1. The author of a work on jurisprudence, or the framer of a draft of a general code, may be more likely to prefer System 2 or 3 to System 1. If there were no existing system and classification and nomenclature were now to be considered for the first time some jurists might prefer System 3 to System 2.

Teachers of law may not agree among themselves as to what course to adopt.[58]

Those instructors who agree on the principle of a general scheme may differ widely as to how specific subjects should be treated in detail.[59] Most teachers are likely to try experiments with their classes before settling upon a permanent method. One troublesome matter may here be briefly alluded to.

Assume that the instructor will take up one by one the different kinds of specific injuries heretofore grouped under torts and classified in the textbooks according to the sort of particular harm inflicted or the nature of the particular right infringed. Shall he, in dealing with each separate subject and before passing to another distinct subject, discuss both the question (1) when liability is imposed on account of actual fault, and the question (2) when the law imposes absolute liability in the absence of fault? Or shall he first go over the different kinds of specific injuries, considering solely (as to each) the question when liability is imposed on account of actual fault, and then, taking up for the first time the subject of absolute liability, go over again the different kinds of specific injuries and consider (as to each) when the law imposes absolute liability in the absence of fault? Or can some third method be devised which would be preferable to either of the above alternatives?

As heretofore stated, the third class comprising cases of absolute liability is made up mainly of two sets of subjects.

We have been considering only one of these divisions, *viz.*, cases where recovery has heretofore been enforced in an action of tort, but where there is, in fact, no actual fault on the part of the defendant.

[58] Professor Wigmore, at the end of his essay on "The Tripartite Division of Torts," says: "No opinion is expressed, it should be added, as to whether it is possible or desirable to teach the law of Torts to-day according to the above grouping." 8 HARV. L. REV. 210. And again, at the end of his "General Analysis of Tort Relations," he says: "The writer expresses no opinion as to whether it is possible or desirable to follow the above order of topics in conducting instruction in Torts." 8 HARV. L. REV. 395.

Professor Bohlen, in the Preface to his recently published CASES ON THE LAW OF TORTS, gives practical reasons why the editor of such a work should hesitate to reject entirely the popular method of arrangement, or to adopt a "very novel classification." See Preface, iv.

[59] See Judge Holmes, 5 AM. L. REV. 4.

We now advert briefly to the other division, *viz.*, cases where recovery has heretofore been enforced in an action of contract, but where there is in fact no real contract, only a fiction contract invented for the sake of allowing a remedy.

Most of the cases in this division are usually grouped under the head of Quasi-Contract, an infelicitous term. The subtopics usually comprised under this general head are very numerous. "Some of them have little in common with others," and "in the past, in treatises upon the common law, they have generally been handled under diverse headings." "During the period when the substantive law was controlled by the forms of procedure, they were classified as contractual or delictual in accordance with the form of action maintainable to enforce them."[60]

Upon this subject of Quasi-Contract there are now two elaborate treatises, one by Professor Keener published in 1893, and another by Professor Woodward in 1913. The term, used in its broadest sense, applies "to all non-contractual obligations which are treated, for the purpose of affording a remedy, as if they were contracts."[61] Keener and Woodward agree on the point which especially concerns us here. They both affirm that, in all the cases grouped under this head of Quasi-Contract, there is no genuine agreement or assent; and that the "contract" heretofore alleged in the declaration is a pure fiction.[62]

"The question naturally arises, why a classification productive of so much confusion was ever adopted. The answer to this question is to be sought, not in the substantive law, but in the law of remedies.

"The only forms of action known to the common law were actions of tort and contract. If the wrong complained of would not sustain an action, either in contract or tort, then the plaintiff was without redress, unless the facts would support a bill in equity.

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[60] Professor Corbin, 21 YALE L. J. 536.

[61] See WOODWARD, § 1.

[62] See WOODWARD, § 4; KEENER, 5, 6; MAINE, ANCIENT LAW, 3 Am. ed., 332; AMES, LECTURES ON LEGAL HISTORY, 160; Judge Swayze, 25 YALE L. J. 4. ". . . the implied contract is a mere fiction, devised by the courts of law to enable them to do justice where justice is impossible on the strict conception of contract or tort. . . . we have come to allow a recovery where money ought to be paid *ex aequo et bono* upon the fiction of a contract that never existed." Professor Corbin says the term quasi-contract "suggests a relation and an analogy between contract and quasi-contract. The relation is distant and the analogy slight. The differences are greater than the similarities." 21 YALE L. J. 544.

"Although from time to time the judicial view of substantive rights broadened under the leavening effect of equity and other considerations, the broadening process did not lead to the creation of remedies sounding in neither contract nor tort. The judges attempted, however, by means of fictions, to adapt the old remedies to the new rights, with the result usually following the attempt to put new wine into old bottles. Thus, largely through the action of assumpsit, that portion of the law of quasi-contract usually considered under the head of simple contracts, was introduced into our law.

"In the action of assumpsit, as the word assumpsit implies, whether it be special or indebitatus assumpsit, a promise must always be alleged, and at one time it was an allegation which had to be proved. It was only natural, therefore, that the courts, in using a purely contractual remedy to give relief in a class of cases possessing none of the elements of a contract, should have resorted to fictions to justify such a course. This was done in the extension of assumpsit to quasi-contract; and the insuperable difficulty of proving a promise where none existed was met by the statement that 'the law implied a promise.' The statement that the *law imposes the obligation* would not have met the difficulties of the situation, since the action of assumpsit presupposed the existence of a promise. The fiction of a promise was adopted then in that class of cases solely that the remedy of assumpsit might be used to cover a class of cases where, in fact, there was no promise." [63]

"The continuance of such a fiction (existing for the purposes of a remedy only) cannot be justified, to say nothing of its extension, in those jurisdictions where all forms of action have been abolished. In such jurisdictions the inquiry should be, not as to the remedy formerly given at common law, but as to the real nature of the right." [64]

The term Quasi-Contract is unsatisfactory to many jurists. Sir Frederick Pollock and Professor Knowlton prefer "constructive contract." The word "constructive" would more distinctly convey the idea of a fictional contract, invented for the sake of the remedy.[65] Neither designation (quasi-contract or constructive contract) "is as happy as would be one that avoided altogether the use of the word 'contract.' " [66]

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[63] KEENER, QUASI-CONTRACT, 14, 15.

[64] *Ibid.*, 160. Compare ANSON, CONTRACTS, 12 ed., 8, 394, 395.

[65] See Sir F. Pollock, 22 L. QUART. REV. 89; 1 ENCYCLOPÆDIA OF LAWS OF ENGLAND, 2 ed., Introduction, 11; Professor Knowlton, 9 MICH. L. REV. 671.

[66] WOODWARD, § 4. As to reasons for retaining the term quasi-contract now that it is in such general use, and as to the difficulty of finding a completely satisfactory substitute, see Professor Corbin, 21 YALE L. J. 545, 553.

In reality, these cases of so-called quasi-contract are instances of "absolute" liability imposed by the courts in the absence of either breach of genuine contract or tort in the sense of fault.[67]

The use of the unfortunate expression Quasi-Contract is largely due to two things:

1. The history of remedial law, as summarized *ante* by Keener.

2. The unwillingness of judges to admit that they, by their decisions, make or change rules of substantive law.

As to the advantage of discarding the fiction of a contract:

Lawyers would be forced to think about the validity of results heretofore blindly accepted.[68] Courts would then examine more carefully into alleged reasons of public policy for imposing absolute liability. In some instances the reasons might be found insufficient. And in such instances the courts might refuse to continue to impose liability, unless fault, or breach of genuine contract, could be established, as it sometimes might be.

We have heretofore said that cases falling under the general head of Absolute Liability can be subdivided as follows: Class 1 — Cases where recovery has heretofore been enforced in an action of tort; Class 2 — Cases where recovery has heretofore been enforced in an action of contract.[69] But this division, temporarily adopted for reasons of convenience, is open to the objection that it is based upon procedure — a mode of classification which it is the purpose of this paper to discourage. Now that the general nature of the cases included under Class 2 has been explained, it is possible to substitute a better basis of classification. Such a basis is found in the following statement, given here in the words of a legal friend:

"It may be suggested that cases of absolute liability may be divided into two classes on a basis which is not founded on procedure although

[67] "Obligation may arise from Quasi-Contract. This is a convenient term for a multifarious class of legal relations which possess this common feature, that without agreement, and without delict or breach of duty on either side, *A* has been compelled to pay or provide something for which *X* ought to have paid or made provision, or *X* has received something which *A* ought to receive. The law in such cases imposes a duty upon *X* to make good to *A* the advantage to which *A* is entitled. . . ." ANSON, CONTRACTS, 12 ed., 8.

[68] "Lawyers and judges fall into habits of mental indolence and take for granted the absolute correctness of legal rules, and apply them mechanically." Judge Swayze, 25 YALE L. J. 14.

[69] See *ante*, 243, 256.

most of the cases in one subdivision would have been enforced at common law by actions of tort, and most of the cases in the other subdivision by actions of assumpsit. The distinction is between (1) cases where the law imposes an obligation upon the defendant to compensate a plaintiff for something which has injured the plaintiff, though there has been no moral fault on the part of the defendant, and (2) cases where the law requires the defendant to restore to the plaintiff a benefit received from him or its value. In one case the plaintiff's injury, in the other the defendant's benefit, is the gist of the action. The latter class of cases will include most, though not all, of the cases generally classified as quasi-contractual."

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